BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SEAN M. MEEHAN Claimant VS. **THE PRINT SOURCE, INC.** Respondent AND **ACCIDENT FUND NAT'L INSURANCE** Insurance Carrier	)	Docket No. **1,056,352**

ORDER

Respondent and its insurance carrier request review of the March 16, 2012 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for the respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript with exhibits taken December 6, 2011, and all pleadings contained in the administrative file.

ISSUES

The Administrative Law Judge (ALJ) found claimant's repetitive work was the prevailing factor causing his left shoulder injury and current need for medical treatment. The ALJ further found claimant's date of accident was his last day worked on June 9, 2011, and that claimant provided timely notice.

Respondent requests review of whether claimant met with personal injury arising out of and in the course of his employment with respondent. Respondent notes that the court ordered independent medical examiner, Dr. George Lucas, opined that claimant's work did not cause claimant's left shoulder tendonitis. Consequently, respondent argues that opinion should be adopted and the ALJ's Order should be reversed.

Claimant argues that he has sustained his burden of proof that his repetitive job duties led to his work-related left shoulder injury and, therefore, the ALJ's Order should be affirmed.

The sole issue raised on review is whether claimant suffered repetitive trauma injury which is the prevailing factor in causing his medical condition and resulting disability or impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant had been employed by respondent for 5 or 6 years. In April 2011 he requested leave pursuant to the Family Medical Leave Act (FMLA) in order to care for his wife who had undergone lumbar spine surgery. Claimant noted he needed to assist his wife getting in and out of bed, bathing, getting dressed and eating meals. Although leave was granted for the requested leave period from April 8, 2011 through June 5, 2011, claimant did continue to occasionally work.

Claimant's job was described as the "mold blow" job but he also would occasionally load boxes filled with empty plastic bottles into a truck. The boxes would be stacked by a forklift and claimant would then reach overhead and twist the boxes to align them so the labels were properly displayed. Claimant performed that task approximately three times in May and twice in June.

Claimant was receiving treatment for back pain from his personal physician, Dr. Craig Parman on an almost bi-weekly basis after January 2011. At his visit with Dr. Parman on May 16, 2011, in addition to back complaints, the claimant also mentioned left shoulder pain for 3 weeks which has been gradually worsening. No mention of a work injury was made although it was noted the shoulder pain was aggravated by physical activity. Dr. Parman provided medication and injected Depomedrol and Lidocaine into claimant's left shoulder joint.

On June 9, 2011, claimant again assisted loading a truck and experienced discomfort in his left shoulder. Claimant reported his pain to his supervisor and was sent to Dr. Benjamin Norman for evaluation. Claimant met with Dr. Norman that day but left during the appointment, apparently to go to a previously scheduled appointment with Dr. Parman. Claimant had an appointment with Dr. Parman on June 9, 2011, for a recheck for his back pain. No mention was made of left shoulder pain at that office visit.

Claimant returned to Dr. Norman on June 10, 2011, for completion of the left shoulder evaluation. Dr. Norman concluded claimant's shoulder condition was not work-related. Dr. Norman noted in part:

> I explained to Mr. Meehan that I do not believe that this is a work related injury. Even though he may have been symptomatic at work yesterday when he performed a certain activity he had preexisting discomfort which did not appear

> suddenly which was under treatment by his personal doctor. The x-rays of his neck and shoulder are unremarkable. He has some symptoms which are not typical for a simple shoulder injury and there is no history of sudden trauma or sudden symptoms appearing during work activities originally. [1]

Because Dr. Parman had already provided treatment for claimant's shoulder, Dr. Norman also suggested claimant return to his personal physician for further evaluation and treatment.

On June 14, 2011, claimant returned to Dr. Parman and then provided a history of a gradual onset of left shoulder pain after loading a truck. Claimant noted the pain gradually worsened and was exacerbated loading a truck on June 9, 2011. Dr. Parman opined claimant's description of his job and alleged injury is consistent with a work-related injury and repeating those activities exacerbated that injury.

On July 20, 2011, at the request of claimant's attorney, Dr. Pedro Murati examined and evaluated claimant. Claimant complained of left shoulder pain, numbness and tingling that radiates down the left hand, that he cannot lift his shoulder above chest level, that he has occasional pain that radiates up to neck and depression due to not being able to work. Upon physical examination, Dr. Murati found claimant had a positive O'Brien's and Hawkins exams on the left. Claimant also had severe impingement and moderate glenohumeral crepitus of the left shoulder. Range of motion was limited in flexion, abduction and full internal rotation. The doctor diagnosed claimant with a left rotator cuff tear, left shoulder impingement syndrome and myofascial pain syndrome of the left shoulder girdle extending into the cervical paraspinals. Dr. Murati placed restrictions on claimant based on an 8-hour day and also recommended cortisone subacromial joint injections, an MRI, physical therapy, anti-inflammatory and pain medications as well as a possible surgical consultation.

Dr. Murati opined that claimant's description of his work activities was consistent with causing micro traumas that would produce his injuries. Dr. Murati further opined that the prevailing factor for claimant's diagnosed medical conditions was the repetitive work activities at respondent in May and June 2011.

Because of the conflicting medical opinions the parties agreed to send claimant to Dr. George Lucas for a court-ordered Independent Medical Examination. Dr. Lucas examined claimant on September 27, 2011, and opined claimant suffered from rotator cuff tendinitis. Dr. Lucas further opined that he did not believe claimant had a rotator cuff tear but did conclude claimant's work aggravated his rotator cuff condition.

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[1] P.H. Trans., Resp. Ex. 2.

As a result of the recent changes in the workers compensation law, the parties then sent a letter to Dr. Lucas and posed the following question:

> Please advise if Mr. Meehan's accident 'arose out of' his employment with The Print Source. In order for the accident to arise out of the employment, the following must occur: (i) the employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal nonemployment life; (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive injury; and (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and need for medical treatment. Please note that prevailing factor has been defined as 'the primary factor, in relation to any other factor.'[2]

In a letter to the parties dated October 13, 2011, Dr. Lucas responded:

> In view of the changes to the Kansas Workers Compensation Act, and which you have outlined for me, I do not believe that the patient's shoulder troubles did indeed arise out of his employment with the stipulations that are imposed by the new workers compensation law. In other words, the prevailing factor in the development of shoulder tendinitis is not the primary factor.[3]

K.S.A. 2011 Supp. 44-508(e) provides:

> 'Repetitive trauma' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. 'Repetitive trauma' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

K.S.A. 2011 Supp. 44-508(f)(2)(A) further provides:

> An injury by repetitive trauma shall be deemed to arise out of employment only if:
>
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
>
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
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> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

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[2] *Id.*, Resp. Ex. 6.

[3] *Id.*, Resp. Ex. 1.

And K.S.A. 2011 Supp. 44-508(g) provides:

> 'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The ALJ analyzed the evidence and concluded claimant met his burden of proof to establish that he suffered work-related repetitive trauma which was the prevailing factor in causing both the medical condition and resulting disability or impairment. This Board member disagrees.

The medical opinions were conflicting. Dr. Parman opined claimant's description of his job and alleged injury was consistent with a work-related injury and repeating those activities exacerbated that injury. Dr. Murati concluded claimant's work activities caused repetitive trauma injury which was the prevailing factor in claimant's medical condition. Conversely, Dr. Norman noted claimant was receiving medical treatment for shoulder complaints before the work activity heightened his symptoms and his shoulder condition was not work-related. Initially, Dr. Lucas concluded work activity had aggravated claimant's shoulder condition but Dr. Lucas finally noted claimant's repetitive work activities were not the prevailing factor for that condition.

This Board member finds the opinions of Drs. Lucas and Norman more persuasive because they corroborate the course of complaints and treatment claimant received. It is significant to note that when claimant first complained of left shoulder pain at his office visit with Dr. Parman on May 16, 2011, he complained of shoulder pain for the last three weeks without noting a work-related cause or injury. That time period predates the alleged incidents of loading boxes in May. Claimant was given injections into his shoulder on May 16, 2011. Dr. Parman's office notes of claimant's appointment on June 9, 2011, indicate that claimant's shoulder was not mentioned and claimant never provided a history to Dr. Parman of an onset of pain from loading boxes until June 14, 2011. Based upon the record compiled to date this Board Member finds claimant failed to meet his burden of proof that he suffered repetitive trauma injury arising out of and in the course of his employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

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[4] K.S.A. 44-534a.

[5] K.S.A. 2011 Supp. 44-555c(k).

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 16, 2012, is reversed.

IT IS SO ORDERED.

Dated this 31st day of May, 2012.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

e: Roger A. Riedmiller, Attorney for Claimant, firm@raresq.com
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier, mschaefer@mtsqh.com
Nelsonna Potts Barnes, Administrative Law Judge